

No. 45773-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Yevgenly Smirnov,

Appellant.

Clark County Superior Court Cause No. 12-1-00971-6

The Honorable Judge Suzan Clark

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
ARGUMENT.....	1
I. Mr. Smirnov may raise the issue that the court erred by instructing the jury on an uncharged alternative means for the first time on review.....	1
II. The court erred by admitting irrelevant and unfairly prejudicial evidence regarding an investigation wholly unrelated to Mr. Smirnov’s case.....	3
III. Mr. Smirnov received ineffective assistance of counsel.	4
CONCLUSION	5

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

<i>In re Griffin</i> , 181 Wash. App. 99, 325 P.3d 322 (2014)	5
<i>In re Pullman</i> , 167 Wn.2d 205, 218 P.3d 913 (2009).....	1
<i>Seattle v. Rainwater</i> , 86 Wn.2d 567, 546 P.2d 450 (1976).....	2
<i>State v. Acosta</i> , 123 Wn. App. 424, 98 P.3d 503 (2004)	5
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995)	4
<i>State v. Brewczynski</i> , 173 Wn. App. 541, 294 P.3d 825 (2013)	3
<i>State v. Cruz</i> , 77 Wn. App. 811, 894 P.2d 573 (1995)	4
<i>State v. Lamar</i> , 180 Wn.2d 576, 327 P.3d 46 (2014)	2
<i>State v. Louie</i> , 68 Wn.2d 304, 413 P.2d 7 (1966).....	2
<i>State v. Sanders</i> , 66 Wn. App. 380, 832 P.2d 1326 (1992)	4
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1998)	2
<i>State v. Simon</i> , 64 Wn. App. 948, 831 P.2d 139 (1991), <i>aff'd in part</i> , 120 Wn.2d 196, 840 P.2d 172 (1992).....	5
<i>State v. Strandy</i> , 49 Wn. App. 537, 745 P.2d 43 (1987).....	5

OTHER AUTHORITIES

ER 401	4
ER 402	4, 5
ER 403	4, 5
RAP 2.5.....	1

ARGUMENT

I. MR. SMIRNOV MAY RAISE THE ISSUE THAT THE COURT ERRED BY INSTRUCTING THE JURY ON AN UNCHARGED ALTERNATIVE MEANS FOR THE FIRST TIME ON REVIEW.

The state appears to concede that the court violated Mr. Smirnov's right to due process by instructing the jury on an uncharged means of committing attempted trafficking in stolen property. Brief of Respondent, pp. 8-12; *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009) (failure to argue an issue on appeal can be treated as a concession). As argued in Mr. Smirnov's Opening Brief, this error may be raised for the first time on appeal because it constitutes manifest error affecting a constitutional right.¹ RAP 2.5(a)(3).

Even so, Respondent argues that this court may not consider Mr. Smirnov's claim because he did not raise it below. Brief of Respondent, pp. 8-12. The state relies on cases holding that non-constitutional instructional error cannot be raised for the first time on appeal. Brief of Respondent, p. 9 (*citing State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998); *Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976);

¹ The state argues that this court should not consider whether this error is reviewable because Mr. Smirnov fails to argue that any exception to RAP 2.5(a) applies. Brief of Respondent, p. 12 (*citing State v. Lindsey*, 177 Wn. App. 233, 247 P.3d 61 (2013)). But Mr. Smirnov's Opening Brief makes clear that his argument rests on a claim of manifest error affecting a constitutional right under RAP 2.5(a)(3). Appellant's Opening Brief, p. 7. The appellant in *Lindsey*, on the other hand, appears to have neglected to claim that any of the exceptions under RAP 2.5(a) applied to that case. *Lindsey*, 177 Wn. App. at 233. The state's reliance on *Lindsey* is misplaced.

State v. Louie, 68 Wn.2d 304, 312, 413 P.2d 7 (1966). But Respondent appears to concede that the error in Mr. Smirnov's case was of constitutional magnitude. See Brief of Respondent, pp. 10-12 (arguing only that the error is not manifest). The state's argument based on cases dealing with non-constitutional issues is inapposite.

An error is manifest if it "actually affected [the defendant's] rights at trial." *State v. Lamar*, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). To secure review, an appellant need only make "*a plausible* showing that the error resulted in actual prejudice, which means that the claimed error had practical and identifiable consequences in the trial." *Id.* (emphasis added).

The appellant must show that the trial judge could have foreseen and corrected the error and that the record contains sufficient facts to review the claim. *Id.*

Here, all of the information necessary to review Mr. Smirnov's claim that the jury was instructed on an uncharged alternative means is contained in the court's instructions. The trial judge should have foreseen and corrected the error when reviewing the instructions below.

Accordingly, the error is manifest. *Id.*

Still, the state argues that this error is not manifest, in part, because the prosecutor only argued the means with which Mr. Smirnov had been charged in closing. Brief of Respondent, p. 11. But the fact that the

prosecutor did not exacerbate the problem by committing misconduct in closing does not undo the clarity of the error on the record. Additionally, the jury was instructed to rely on the court's instructions for the applicable law, not the attorneys' arguments. CP 4. Respondent's claim regarding the state's closing argument is inapposite to whether the court violated Mr. Smirnov's right to due process.

The court deprived Mr. Smirnov of a fair trial by instructing the jury in a manner permitting conviction of an uncharged alternative means. *State v. Brewczynski*, 173 Wn. App. 541, 548, 294 P.3d 825 (2013). His conviction must be reversed. *Id.*

II. THE COURT ERRED BY ADMITTING IRRELEVANT AND UNFAIRLY PREJUDICIAL EVIDENCE REGARDING AN INVESTIGATION WHOLLY UNRELATED TO MR. SMIRNOV'S CASE.

Here, the court erred by admitting evidence regarding a separate investigation Frazier was conducting. RP 331-32; ER 401, ER 402, ER 403. The evidence was not relevant to what Mr. Smirnov knew when Frazier told him that he had been "shopping." The testimony was also prejudicial regarding the only factual issue in the case: whether Mr. Smirnov knew that Frazier was purporting to sell him stolen property.

Nonetheless, the state claims that the evidence was admissible. Brief of Respondent, pp. 12-15. The state relies on cases permitting expert testimony regarding the "arcane" world of drug dealing and

pimp/prostitute relationships. Brief of Respondent, pp. 14-15 (*citing State v. Avendano-Lopez*, 79 Wn. App. 706, 711, 904 P.2d 324 (1995); *State v. Cruz*, 77 Wn. App. 811, 813-14, 894 P.2d 573 (1995); *State v. Sanders*, 66 Wn. App. 380, 832 P.2d 1326 (1992); *State v. Strandy*, 49 Wn. App. 537, 543-44, 745 P.2d 43 (1987); *State v. Simon*, 64 Wn. App. 948, 964, 831 P.2d 139 (1991), *aff'd in part*, 120 Wn.2d 196, 840 P.2d 172 (1992)).

But none of the authority upon which Respondent relies permitted testimony regarding the specifics of investigations unrelated to the actual case at bar. Rather, each case addresses non-specific evidence regarding the practices of drug dealers or pimps, in general. *Id.* The state cannot point to any case holding that evidence such as that admitted in Mr. Smirnov's case is relevant or passes the analysis under ER 403. This court can presume that the state found no such authority after diligent search. *In re Griffin*, 181 Wash. App. 99, 107, 325 P.3d 322, 325 (2014).

The court erred by admitting irrelevant evidence whose risk of unfair prejudice and confusion outweighed any probative value. *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004); ER 402, ER 403. Mr. Smirnov's conviction must be reversed. *Acosta*, 123 Wn. App. at 443.

III. MR. SMIRNOV RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Smirnov relies on the argument set forth above and in his Opening Brief.

CONCLUSION

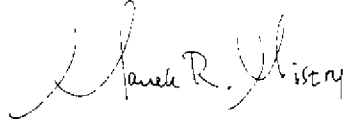
For the reasons set forth above and in Mr. Smirnov's Opening Brief, Mr. Smirnov's conviction must be reversed.

Respectfully submitted on November 10, 2014,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Yevgenly Smirnov
5110 NE 93rd Street
Vancouver, WA 98665

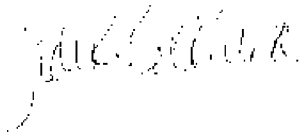
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 10, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

November 10, 2014 - 1:02 PM

Transmittal Letter

Document Uploaded: 457733-Reply Brief.pdf

Case Name: State v. Yevgenly Smirnov

Court of Appeals Case Number: 45773-3

Is this a Personal Restraint Petition? Yes ☐ No

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: backlundmistry@gmail.com

A copy of this document has been emailed to the following addresses:

prosecutor@clark.wa.gov